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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRE LUIS ORTEGA,

Defendant and Appellant.

F075906

(Super. Ct. No. DF012444A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Eric Bradshaw, Judge.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Robert Gezi, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Snauffer, J. and DeSantos, J.

Andre Luis Ortega (appellant) challenges his 25-year-to-life sentence, contending the trial court improperly applied two prior strike convictions arising out of a single act against a single victim in violation of *People v. Vargas* (2014) 59 Cal.4th 635 (*Vargas*). We will remand for resentencing to allow appellant to make an appropriate motion with supporting documentation as to appellant's prior convictions.

BACKGROUND

In September 2015, appellant was serving a term of life without the possibility of parole plus 25 years to life in the Kern Valley State Prison when correctional officers observed him fighting with another inmate in a prison yard. Appellant made a slashing motion with one hand and then tossed an object toward the yard urinals. The object was later discovered to be a state-issued razor wrapped with cloth and tape.

A Kern County jury convicted appellant of felony inmate possession of a weapon. (Pen. Code,¹ § 4502, subd. (a).) In bifurcated proceedings, the trial court found true two prior strike convictions: murder (§ 187, subd. (a)) and criminal street gang participation (§ 186.22, subd. (a)), both arising out of the same 2004 San Joaquin County Superior Court case.

The trial court subsequently summarily rejected appellant's motion to strike one of the prior strike convictions pursuant to *Romero v. Superior Court* (1996) 13 Cal.4th 497 (*Romero*) and sentenced appellant to a prison term of 25 years to life, consecutive to appellant's previously imposed sentence of life without the possibility of parole plus 25 years to life.

DISCUSSION

Appellant contends his third strike 25-year-to-life sentence was unauthorized because the trial court abused its discretion in not striking one of appellant's prior strike offenses arising out of the same act. He alternatively contends he received ineffective

¹ Further statutory references are to the Penal Code.

assistance of counsel for not expressly raising the issue when the trial court considered his motion to strike under *Romero*.

In *Vargas, supra*, 59 Cal.4th 635, the Supreme Court considered “whether two prior convictions arising out of a single act against a single victim can constitute two strikes under the Three Strikes law.” (*Id.* at p. 637.) The *Vargas* defendant had prior qualifying strike offenses for carjacking and robbery, both “based on the same act of taking the victim’s car by force” (*Id.* at p. 640.) The high court found it an abuse of discretion, however, not to dismiss one of the strikes based on the legislative and initiative intent of the Three Strikes law that a person “would have three chances—three swings of the bat, if you will—before the harshest penalty could be imposed.” (*Vargas*, at p. 646.)

Applying *Vargas*, appellant asserts the trial court erroneously lengthened his sentence as a third strike offense by treating his prior convictions for both murder (§ 187) and criminal street gang participation (§ 186.22, subd. (a))—both arising out of the same trial court case, out of the same conduct, and against the single victim—as separate strikes. The Attorney General counters that appellant’s prior strikes are not akin to those alleged in *Vargas*, because they were not committed at the same time, based on the same act, and against the same victim. The Attorney General also asserts the issue is forfeited as waived for not expressly raising it before the trial court.

The Third Appellate District reviewed appellant’s 2004 trial court proceedings in *People v. Ortega* (2006) 145 Cal.App.4th 1344 (*Ortega*)² and summarized his prior convictions:

“The jury found true the special circumstance allegation that while defendant was an active participant in a criminal street gang, he

² This court must take judicial notice of all “decisional, constitutional, and public statutory law of this state and of the United States.” (Evid. Code, § 451, subd. (a).) Appellant’s request to take judicial notice of his previously published case in *Ortega, supra*, 145 Cal.App.4th 1344, is therefore granted.

intentionally killed the victim [§ 187] to further the activities of the criminal street gang. (§ 190.2, subd. (a)(22).) It found true the allegation that defendant committed the offense for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) The jury also found defendant guilty of violating section 186.22, subdivision (a), actively participating in a criminal street gang. (*Ortega, supra*, 145 Cal.App.4th at p. 1355, fn. omitted.)

The elements of the substantive offense of criminal street gang participation under section 186.22, subdivision (a) are:

“(1) ‘[a]ctive participation in a criminal street gang, in the sense of participation that is more than nominal or passive,’ (2) ‘ “knowledge that [the gang’s] members engage in or have engaged in a pattern of criminal gang activity,” ’ and (3) ‘the person “willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.” ’ ” (*People v. Mesa* (2012) 54 Cal.4th 191, 197.)

The Attorney General claims appellant mistakenly presumes the felonious conduct required to find the third element of criminal street gang participation arose out of the same act of committing the murder, for which he was charged and convicted in the same case. As the Attorney General notes, the felonious criminal conduct element need not necessarily be charged and found true. (See *People v. Infante* (2014) 58 Cal.4th 688, 694–695, fn. 2.) While we agree with appellant that it appears likely both offenses are based on the same underlying murder, we must agree with the Attorney General that we cannot so conclude as a matter of law based on the limited appellate record.

The Attorney General asserts this sentencing issue has been forfeited as waived for not expressly presenting it to the trial court. But under *Vargas*, a trial court abuses its discretion in not dismissing a prior strike where “the nature and circumstances of defendant’s prior strike convictions demonstrate the trial court was required to dismiss one of them because failure to do so would be inconsistent with the spirit of the Three Strikes Law.” (*Vargas, supra*, 59 Cal.4th at p. 649.) A trial court must effectively consider *Vargas* whenever presented with a *Romero* motion.

Given the imperfect record relating to appellant’s prior convictions and the unique circumstances presented, we decline to find whether appellant waived the issue, and thus

whether trial counsel may have been ineffective for failing to raise *Vargas* in appellant's *Romero* motion (*Strickland v. Washington* (1984) 466 U.S. 668), or whether the trial court otherwise had an affirmative duty to consider *Vargas* when presented with facts arguably warranting its application. In the interests of judicial economy and to ensure the protection of appellant's rights, we order the matter remanded for the limited purpose of allowing appellant to file a renewed *Romero* motion, supported by appropriate documentary evidence from appellant's 2004 convictions, to permit the trial court to consider whether one of appellant's prior strikes should be dismissed under *Vargas*.

DISPOSITION

The judgment of conviction is affirmed, but appellant's sentence is vacated for the limited purpose of remanding the case for a new sentencing hearing for appellant to make an appropriate motion pursuant to *Romero, supra*, 13 Cal.4th 497 and *Vargas, supra*, 59 Cal.4th 635. If appellant fails to make such a motion within 90 days of remanding the matter, or the trial court denies the motion, the previously imposed sentence shall be reinstated. If the trial court grants the motion, it shall prepare and forward to all appropriate entities a certified copy of an amended abstract of judgment.